

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

KEVIN D. MOORE, 36285-177,	§	
Petitioner,	§	No. 3:08-CV-1126-O
	§	3:07-CR-125-O
vs.	§	
	§	
UNITED STATES OF AMERICA ,	§	
Respondent.	§	

**FINDINGS, CONCLUSIONS AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

This cause of action was referred to the United States Magistrate Judge pursuant to the provisions of Title 28, United States Code, Section 636(b), as implemented by an order of the United States District Court for the Northern District of Texas. The Findings, Conclusions and Recommendation of the United States Magistrate Judge follow:

FINDINGS AND CONCLUSIONS

I. Procedural Background

Petitioner has filed a motion to vacate, set aside or correct his sentence, pursuant to 28 U.S.C. § 2255. Petitioner is an inmate in the federal prison system. Respondent is the United States of America.

On March 1, 2008, a jury found Petitioner guilty of transporting and shipping child pornography in violation of 18 U.S.C. § 2252(a)(1) and (b)(1), and possession of child pornography in violation of 18 U.S.C. § 2252(a)(4)(B). Petitioner was sentenced to 240 months confinement for transporting and shipping child pornography and 120 months confinement for possession of child pornography, to run consecutively, followed by lifetime supervised release

on both counts.

On June 27, 2008, Petitioner filed the instant motion to vacate, set aside or correct sentence under 28 U.S.C. § 2255.

On July 7, 2008, Petitioner filed a notice of appeal with the Fifth Circuit Court of Appeals. That appeal is still pending.

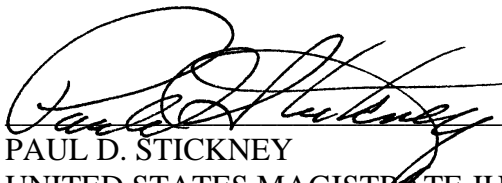
II. Discussion

A district court may not adjudicate the merits of an application for post-conviction relief if a direct appeal is pending before the court of appeals. *Fassler v. United States*, 858 F.2d 1016, 1019 (5th Cir. 1988). Petitioner's appeal is currently pending before the Fifth Circuit. *Moore v. United States*, No. 08-10645 (5th Cir. 2008). Therefore, Petitioner is precluded from seeking post-conviction relief at this time.

RECOMMENDATION

For the foregoing reasons, the Court recommends that the District Court summarily dismiss without prejudice Petitioner's motion to correct, vacate or set aside sentence pursuant to 28 U.S.C. § 2255.

Signed this 7th day of August, 2008.


PAUL D. STICKNEY
UNITED STATES MAGISTRATE JUDGE

**INSTRUCTIONS FOR SERVICE AND
NOTICE OF RIGHT TO APPEAL/OBJECT**

The United States District Clerk shall serve a true copy of these findings, conclusions and recommendation on Plaintiff. Pursuant to Title 28, United States Code, Section 636(b)(1), any party who desires to object to these findings, conclusions and recommendation must serve and file written objections within ten days after being served with a copy. A party filing objections must specifically identify those findings, conclusions or recommendation to which objections are being made. The District Court need not consider frivolous, conclusory or general objections. A party's failure to file such written objections to these proposed findings, conclusions and recommendation shall bar that party from a *de novo* determination by the District Court. *See Thomas v. Arn*, 474 U.S. 140, 150 (1985). Additionally, any failure to file written objections to the proposed findings, conclusions and recommendation within ten days after being served with a copy shall bar the aggrieved party from appealing the factual findings and legal conclusions of the Magistrate Judge that are accepted by the District Court, except upon grounds of plain error. *Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1417 (5th Cir. 1996) (en banc).